

**IN THE HIGH COURT OF NEW ZEALAND  
WELLINGTON REGISTRY  
I TE KOTI MATUA O AOTEAROA  
TE WHANGANUI-Ā-TARA ROHE**

**CIV-2019-**

**UNDER**

The Judicial Review Procedure Act 2016 and/or Part 30 of the High Court Rules, the Inquiries Act 2013, and the New Zealand Bill of Rights Act 1990

**IN THE MATTER OF**

Rulings made by the Government Inquiry into Operation Burnham and related matters

**(APPLICANTS NOT TO BE IDENTIFIED BY REASON OF PROHIBITION ON PUBLICATION UNDER SECTION 15(1)(a)(iii) OF THE INQUIRIES ACT 2013)**

**BETWEEN**

**First Applicants**

**AND**

**Second Applicant**

**AND**

**THE GOVERNMENT INQUIRY INTO  
OPERATION BURNHAM AND RELATED  
MATTERS**

**First Respondent**

**AND**

**THE ATTORNEY-GENERAL**

**Second Respondent**

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**STATEMENT OF CLAIM**

**Dated**

**2019**

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**THE APPLICANTS say:**

**The parties**

- 1 The first applicants are from, and at the time of the military operation known as “Operation Burnham” (referred to in para 8 below) were residents of, the village of Khak Khuday Dad, Baghlan Province, Afghanistan.
- 2 The second applicant is from, and at the time of Operation Burnham was a resident of, the village of Naik, Baghlan Province, Afghanistan.
- 3 The applicants have been designated pursuant to s 17 of the Inquiries Act 2013 (“the Act”) as core participants in the first respondent inquiry (“the Inquiry”).
- 4 The Inquiry was established on by the second respondent on 11 April 2018 as a Government Inquiry pursuant to s 6(3) of the Act. The members of the Inquiry are Sir Terence Arnold KNZM QC (Chairperson) and Sir Geoffrey Palmer KCMG AC QC PC. A copy of the Inquiry’s terms of reference (“the Terms of Reference”) is annexed to this statement of claim as if pleaded in full herein.
- 5 The first respondent is sued in respect of its Ruling No 1 of 21 December 2018 (“the Ruling”).
- 6 The second respondent is sued in respect of his role and responsibility as the Appointing Minister for the Inquiry and in respect of his acts and omissions in respect of the setting of the Terms of Reference under s 7 of the Act.

**Background**

- 7 In 2010 and in particular August of 2010, soldiers of the New Zealand Defence Force (“NZDF”), including the New Zealand Special Air Service (“NZSAS”), were stationed in Baghlan Province, Afghanistan.
- 8 On or about 22 August 2010 (local time) NZDF forces, in particular NZSAS members, initiated and conducted a military raid (or raids) in the Tirgiran Valley, Baghlan Province. with assistance from other military forces and/or agencies. The military raid (or raids) was, and is known as “Operation Burnham”.

- 9       The applicants' villages of Khak Khuday Dad and Naik referred to in paras 1 and 2 above ("the Villages") and/or their respective occupants at the time were the or alternatively a designated target of Operation Burnham. The Villages and/or their respective occupants at the time (including the applicants) were attacked and/or targeted as such in the course of Operation Burnham.
- 10       Until in or about March 2017 when the book "Hit and Run" referred to in the immediately following para was published, the NZDF consistently claimed that Operation Burnham and in particular its participation therein was a lawful and legitimate military operation; and/or that only alleged "insurgents" (and thus no "civilians") were injured or killed during Operation Burnham.
- 11       On 22 March 2017, a book entitled "Hit & Run: the New Zealand SAS in Afghanistan and the Meaning of Honour" ("**Hit and Run**"), co-authored by investigative journalists Nicky Hager and Jon Stephenson, was published in New Zealand.
- 12       **Hit and Run** made detailed and carefully documented claims concerning the conduct and outcome of Operation Burnham, in particular that six (non-insurgent) civilians from the Villages were killed and 15 wounded during the raid (or raids), and property in the Villages deliberately destroyed and damaged. **Hit and Run** further alleged that the civilian deaths and casualties and other wrongdoing by NZSAS and/or NZDF personnel had been covered up by NZDF ever since. For convenience, the allegations made in **Hit and Run** will be referred to as "the **Hit and Run** allegations".
- 13       After the publication of **Hit and Run**, lawyers acting for affected residents of the Villages including the first and second applicants wrote to the Prime Minister and the second respondent, by letters dated 24, 28 and 29 March 2017, making further allegations (in particular, of breaches of domestic and international law during Operation Burnham) and providing further detailed information from and on behalf of their clients. For convenience, the **Hit and Run** allegations and the Villagers' allegations will be referred to as "the Operation Burnham allegations".

- 14 The Operation Burnham allegations included detailed and substantiated allegations of the commission, by participants in Operation Burnham, of war crimes, breaches of the Geneva Conventions, and breaches of the law of conflict and the rules of military engagement.
- 15 In the correspondence referred to in para 13 above, the applicants' lawyers requested that a full and independent inquiry be established and held under the Act, to investigate the Operation Burnham allegations. Contemporaneously, others, including the authors of **Hit and Run**, also called for the holding of an independent inquiry into either or both of the **Hit and Run** allegations and the Operation Burnham allegations.
- 16 On a date in late March 2017, the New Zealand Government (in particular all or any of the Prime Minister, the Minister of Defence and Cabinet) decided to refer the **Hit and Run** allegations to the Chief of the Defence Force ("CDF") for decision (by him) whether further action under and pursuant to s 102 of the Armed Forces Discipline Act 1971 was warranted ("the referral to CDF"; "the referral to CDF decision").<sup>1</sup>
- 17 Other than the Referral to the CDF, the New Zealand Government (in particular, the Prime Minister, Minister of Defence and Cabinet) took at that time no steps to investigate or to cause an inquiry and investigation to be made into the Operation Burnham allegations.
- 18 On or shortly before 30 March 2017 the CDF provided the Minister of Defence (and in turn, the Cabinet) with advice of his decision, purportedly pursuant to and in terms of the Armed Forces Discipline Act, that based on the information he had considered he did not "consider that the obligation to conduct an internal Defence Force inquiry into Operation Burnham had been triggered" ("the CDF decision").
- 19 On or about 3 April 2017, the then New Zealand Government (acting through all or any of the Prime Minister, the Minister of Defence and Cabinet) accepted and adopted the CDF decision and/or further decided not to conduct an independent

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<sup>1</sup> Correspondence between the first respondent and McLeod & Associates dated 6 April 2016 (sic; actually 2017), 7 April 2017 and 8 May 2017.

inquiry into or any other investigation of the Operation Burnham allegations (“the refusal to hold an independent inquiry”).

- 20 On 18 August 2017, the applicants applied to judicially review the foregoing decisions above, namely the referral to CDF decision; the CDF decision; and the refusal to hold an independent inquiry (“the first judicial review proceeding”). The applicants alleged that the referral to CDF decision and/or the refusal to hold an independent inquiry, or alternatively both decisions combined, amounted to or alternatively brought about an unlawful refusal or failure on the part of the New Zealand Government and in particular the Minister of Defence to exercise discretion under the Inquiries Act to establish an independent inquiry into the Operation Burnham allegations, and/or to address and determine on the merits the requests for an independent inquiry.
- 21 On 17 April 2018 following the establishing of the Inquiry on 11 April 2018, counsel for the applicants wrote to the Inquiry to advise their interest in the Inquiry and their desire to participate.
- 22 On 9 May 2018, counsel for the applicants and Crown counsel acting for the respondents in the first judicial review proceeding filed a joint memorandum in the High Court, noting the establishment of the Inquiry and that:

*The parties agree that – subject to two qualifications – the Inquiry’s establishment means there would be no practical utility in continuing to litigate the substance of the dispute between them.*
- 23 The two qualifications were the matters of costs and ongoing name suppression, both of which were resolved. The applicants accordingly filed a notice of discontinuance of the first judicial review proceeding on 15 June 2018, together with a joint memorandum as to costs.
- 24 On 26 March 2018, the Inspector-General of Intelligence and Security (“IGIS”) commenced a separate inquiry pursuant to s 176(1) of the Intelligence and Security Act 2017 into the activities, if any, of the Government Communications Security Bureau and the New Zealand Security Intelligence Service in relation to certain specific events in Afghanistan (“the IGIS inquiry”).

- 25 On 16 November 2018, the first respondent and the IGIS agreed to a Memorandum of Understanding (“the MOU”), setting out the terms of cooperation between the Inquiry and the IGIS inquiry.
- 26 Having heard submissions from its core participants at a hearing held on 21–22 November 2018, the Inquiry issued the Ruling on 21 December 2018. The Ruling addressed key substantive and procedural issues for the future conduct of the Inquiry. The applicants will rely on the full text of the Ruling at the trial of this proceeding.

### **The decisions under review**

- 27 In anticipation of the Ruling, the applicants sought from the Inquiry *inter alia* the following rulings, orders or directions:<sup>2</sup>
- 27.1 That a primary purpose or function of this Inquiry is to satisfy the investigative obligation of the right to life in relation to the six individuals who lost their lives in Operation Burnham, and by analogy in relation to the further fifteen individuals who were injured, and that the principles outlined in **Jordan v United Kingdom**<sup>3</sup> and related cases should govern the Inquiry;
- 27.2 That it was not open to the Inquiry to conduct a closed material procedure which had the effect of excluding non-Government core participants and their counsel from participation in the proceedings of the Inquiry;
- 27.3 The disclosure of relevant documents should be ordered and prioritised in certain respects, including by the provision of lists and the prioritisation of key topics;
- 27.4 That the non-NZDF core participants be permitted to propose formal written questions of the NZDF and other Government agencies for the purposes of the Inquiry;

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<sup>2</sup> Memorandum of Counsel for Former Residents of Khak Khuday Dad and Naik Requesting Orders as to Procedural Matters, dated 19 November 2018, para [89].

<sup>3</sup> (2003) 37 EHRR 2.

- 27.5 That adequate disclosure of relevant documents (including declassification of documents) and interrogatories will be completed, and sufficient time allowed to analyse the results, before beginning hearings;
- 27.6 Identification of those individuals subject to the jurisdiction and powers of the Inquiry who were or are in key positions in relation to Operation Burnham who, owing to their role in the Operation, need to be available for examination, with orders to compel testimony if necessary;
- 27.7 Preparation of a list of all other proposed witnesses for the Inquiry.
- 28 In the Ruling, the Inquiry declined to make a ruling that the Inquiry should be conducted so as to meet New Zealand's "right to life" investigative obligations, instead merely observing:<sup>4</sup>

*Ultimately, as we have already said, we do not see that it is necessary for us to determine whether or not this Inquiry is intended to meet a "right to life" investigative obligation. As noted, the TOR do not state explicitly that it is. Nevertheless, we accept that, to the extent that an inquiry has a mandate to make factual findings and findings of fault (albeit that it cannot determine civil, criminal or disciplinary liability) and to make recommendations, it may play a part in meeting a country's international investigative obligations. But to say that an inquiry plays a role in a country's response is not to say that it is the country's entire response (which could, of course, include further investigations and other action by appropriate state agencies).*

("The right to life investigation ruling").

- 29 In the Ruling, the Inquiry also made further rulings and directions ("the procedural rulings"), *inter alia* to the following effect:
- 29.1 Consequent upon the right to life investigation ruling, an expansive approach to natural justice (as sought by the applicants) was not warranted;<sup>5</sup>
- 29.2 The benefits of open justice, a mandatory consideration under s 15(2)(a) of the Act, were not practically applicable to the Inquiry;<sup>6</sup>

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<sup>4</sup> At [40]; see more generally at [32]–[42].

<sup>5</sup> At [43]–[44].

<sup>6</sup> At [23]–[27].

- 29.3 The Inquiry's evidence-gathering would (subject to the possibility that some of it may be able to be carried out in public) be conducted in private, by the Inquiry and Counsel Assisting;<sup>7</sup>
  - 29.4 The existence of the concurrent IGIS inquiry meant that aspects of the Inquiry which overlapped with the IGIS inquiry must be conducted in private ("the overlapping inquiries ruling");<sup>8</sup>
  - 29.5 Core participants will not be able to cross-examine witnesses except in limited circumstances;
  - 29.6 The identities of NZSAS members would be protected by a permanent non-publication order;
  - 29.7 Redacted or summarised versions of confidential witness transcripts would not be provided, given the time, effort and additional expense involved;
  - 29.8 The need to conduct as much of the Inquiry in public as is reasonably practical could be met by conducting public "modules" and placing material on the Inquiry's website;
  - 29.9 It was not be necessary for the Inquiry to produce a complete list of all classified material supplied to it.
- 30 On 4 February 2019, counsel for the applicants wrote to the second respondent requesting his intervention, pursuant to s 7(5) of the Act, to amend the Terms of Reference to incorporate specific reference to the right to life investigative obligation, or, in the alternative, to initiate a separate investigation or inquiry which would satisfy New Zealand's investigative obligation under the right to life (respectively, "the s 7(5) request" and "the alternative inquiry request").
- 31 By letter dated 4 March 2018, the second respondent replied to the applicants' correspondence, declining both of the requests summarised in the immediately preceding paragraph.

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<sup>7</sup> At [78](a).

<sup>8</sup> At [78](b).

**FIRST GROUND OF JUDICIAL REVIEW: RIGHT TO LIFE INVESTIGATION RULING UNLAWFUL, IN BREACH OF NATURAL JUSTICE AND UNREASONABLE**

- 32 Under New Zealand domestic law, the New Zealand Government was under a duty to conduct an independent inquiry into the Operation Burnham allegations.

**Particulars:**

The applicants rely on:

- Sections 8 and 9 of the New Zealand Bill of Rights Act 1990
- Customary international law as incorporated into the common law of New Zealand.

- 33 Further or alternatively, under international law the New Zealand Government was under an obligation (or obligations) to conduct an independent inquiry into the Operation Burnham allegations.

**Particulars:**

The applicants rely on:

- International Covenant on Civil and Political Rights, Articles 2, 6(1), 7, 9(1)
- International Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Articles 2, 4, 5, 12
- Customary international law, whether or not formally incorporated or received into New Zealand law
- The Minnesota Protocol on the Investigation of Potentially Unlawful Death (Office of the United Nations High Commissioner for Human Rights, Revised 2017).

- 34 Clause 5 of the Terms of Reference prescribed and mandated as the purpose of the Inquiry the following:

*The matter of public importance which the Inquiry is directed to examine is the allegations of wrongdoing by NZDF forces in connection with Operation Burnham and related matters. Operation Burnham took place during a non-international armed conflict, and the applicable legal framework (including international humanitarian law) will be considered.*

- 35 The right to life investigation ruling is unlawful and/or in breach of natural justice and/or unreasonable, for all or any of the following reasons:
- 35.1 Insofar as the right to life investigation ruling reasoned that it was not “necessary to determine whether or not [the] Inquiry [was] intended to meet a ‘right to life’ investigative obligation”, the Inquiry effectively decided that neither of the investigative duties pleaded in paras 32 and 33 above arose under the Terms of Reference, thereby misinterpreting the Terms of Reference and/or failing to comply with and fully perform an inquiry into Operation Burnham in accordance with the Terms of Reference;
  - 35.2 Further or alternatively, the right to life investigation ruling was contrary to, and in the alternative failed to take into account as a relevant consideration, the duty under New Zealand domestic law to conduct an independent inquiry referred to in para 32 above;
  - 35.3 Further or alternatively, the right to life investigation ruling was contrary to, and in the alternative failed to take into account as a relevant consideration, the duty under international law to conduct an independent inquiry referred to in para 33 above;
  - 35.4 Further or alternatively, the right to life investigation ruling was legally flawed and/or was unreasonable, in that it proceeded on the erroneous premise that the investigative duties owed the terms of either or both paras 32 and 33 above could be satisfied by means of a (hypothetical) post hoc amalgamation of various procedures, of which the Inquiry might (in theory) be but one component;
  - 35.5 Overall, the Inquiry failed by reason of the foregoing matters to exercise, at all or in the alternative in a proper and lawful manner, the discretion(s) conferred on it under the Act in relation to the interpretation and application of the Terms of Reference.
- 36 Accordingly, the right to life investigation ruling was unlawful, in breach of natural justice and/or unreasonable, and accordingly invalid.

**WHEREFORE** the applicants claim:

- (a) A declaration that the right to life investigation ruling is unlawful, in breach of natural justice, and unreasonable, and accordingly invalid;
- (b) An order of or in the nature of certiorari quashing the right to life investigation ruling;
- (c) The costs of and incidental to this application for judicial review.

**SECOND GROUND OF JUDICIAL REVIEW: PROCEDURAL RULINGS UNLAWFUL, IN BREACH OF NATURAL JUSTICE AND UNREASONABLE**

**THE APPLICANTS** repeat paras 1 – 36 inclusive above and say:

- 37 Subject to ss 10 and 14(2) and (3) of the Act and the Terms of Reference, the Inquiry has the powers in relation to the conduct of the Inquiry conferred on it by s 14(1) and s 15(1) of the Act..
- 38 Further or alternatively, the Inquiry’s powers of imposition of “restrictions on access to” the Inquiry under s 15(1) of the Act must be exercised in accordance with s 15(2), in particular by taking into account the criteria specified in that subsection.
- 39 Under New Zealand domestic law, the New Zealand Government and the Inquiry are each and respectively under a duty to conduct an inquiry which meets certain minimum standards of independence, and transparency, and which affords possible victims of human rights breaches and their next of kin minimum standards of natural justice and participation.

**Particulars:**

The applicants rely on:

- Sections 8, 9 and 27 of the New Zealand Bill of Rights Act 1990
- Sections 10, 14, 15 and 17 of the Act.
- Customary international law as incorporated into the common law of New Zealand
- The Terms of Reference.

- 40 Further or alternatively, under international law the New Zealand Government and the Inquiry are each and respectively under a duty to conduct an inquiry which meets certain minimum standards of independence, and transparency, and which affords possible victims of human rights breaches and their next of kin minimum standards of natural justice and participation.

**Particulars:**

The applicants rely on:

- International Covenant on Civil and Political Rights, Articles 2, 6(1), 7, 9(1)
- International Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Articles 2, 4, 5, 12
- Customary international law, whether or not formally incorporated or received into New Zealand law
- The Minnesota Protocol on the Investigation of Potentially Unlawful Death (Office of the United Nations High Commissioner for Human Rights, Revised 2017)
- The Terms of Reference.

- 41 The procedural rulings are unlawful, in breach of natural justice and unreasonable for all or any of the following reasons:

41.1 The procedural rulings were made consequent and/or are dependent upon the (invalid) right to life investigation ruling;

41.2 Further or alternatively, all or any of the procedural rulings were inconsistent with and/or failed to take into account as a relevant consideration, either or both of the duties under domestic law and/or under international law as to conduct of the Inquiry referred to in paras 37 – 40 above.

- 42 Accordingly, the procedural rulings (all or any of them) were unlawful, in breach of natural justice and/or unreasonable and invalid.

**WHEREFORE** the applicants claim:

- (a) A declaration that the procedural rulings (all or any of them) are unlawful, in breach of natural justice and/or unreasonable, and accordingly invalid;

- (b) An order of or in the nature of certiorari quashing the procedural rulings (all or any of them);
- (c) The costs of and incidental to this application for judicial review.

**THIRD GROUND OF JUDICIAL REVIEW: OVERLAPPING INQUIRIES RULING UNLAWFUL, IN BREACH OF NATURAL JUSTICE AND UNREASONABLE**

**THE APPLICANTS** repeat paras 1 – 42 inclusive above and say:

- 43 For her part the IGIS must conduct the IGIS inquiry (in private and as her own independent inquiry), pursuant to s 176(1) of the Intelligence and Security Act.
- 44 The overlapping inquiries ruling is unlawful, in breach of natural justice and/or unreasonable for all or any of the following reasons:
  - 44.1 Contrary to the explicit or implicit reasoning of the overlapping inquiries ruling, neither the Intelligence and Security Act nor the MOU can have the legal effect of constraining the Inquiry from disclosing information which it would otherwise be permitted (or required) to lawfully disclose;
  - 44.2 The overlapping inquiries ruling was contrary to or alternatively failed properly to have regard to the mandatory relevant considerations stated in s 15(2) of the Act;
  - 44.3 The overlapping inquiries ruling was premised on an error of law, or alternatively an irrelevant consideration, namely that the effect of the IGIS inquiry and the MOU was that the Inquiry was constrained in its power to disclose information which was common to and/or of relevance to both inquiries;
  - 44.4 Overall and as a consequence, the overlapping inquiries ruling was contrary to or inconsistent with the Inquiry's duties under and/or powers conferred by the provisions of the Act referred to in paras 37 - 38 above.
- 45 Accordingly, the overlapping inquiries ruling was unlawful, in breach of natural justice and/or unreasonable, and is invalid.

**WHEREFORE** the applicants claim:

- (a) A declaration that the overlapping inquiries ruling was unlawful, in breach of natural justice and/or unreasonable, and accordingly invalid;
- (b) An order of or in the nature of certiorari quashing the overlapping inquiries ruling;
- (c) The costs of and incidental to this application for judicial review.

**FOURTH GROUND OF JUDICIAL REVIEW: SECOND RESPONDENT'S SETTING OF THE TERMS OF REFERENCE AND IN THE ALTERNATIVE REJECTION OF THE SECTION 7(5) REQUEST AND/OR THE ALTERNATIVE INQUIRY REQUEST UNLAWFUL, IN BREACH OF NATURAL JUSTICE AND UNREASONABLE**

**THE APPLICANTS** repeat paras 1 – 45 inclusive above and say:

- 46 The second respondent was subject to the duties referred to in paras 39 and 40 above..
- 47 If (which is denied) either or both of the first respondent's right to life investigation ruling and the procedural rulings under and in terms of the Terms of Reference are held to be lawful and valid as they stand, either or both of (i) the second respondent's original exercise of statutory power and/or statutory decision under s 7 of the Act to set the Terms of Reference and (ii) his rejection of the s 7(5) request and/or the alternative inquiry request were unlawful, in breach of natural justice and unreasonable for all or any of the following reasons:
  - 47.1 The respective decisions of the second respondent (and each of them) were inconsistent with, and thereby brought about a state of non-compliance with, all or any of the duties referred to in paras 39 and 40 above;
  - 47.2 Further or alternatively, the respective decisions of the second respondent (and each of them) failed to take into account as relevant

consideration all or any of the duties referred to in paras 39 and 40 above.

**WHEREFORE** the applicants claim:

- (a) A declaration that the second respondent's setting of the Terms of Reference and/or decision to reject the s 7(5) request and the alternative inquiry request were unlawful, in breach of natural justice and/or unreasonable, and accordingly invalid;
- (b) An order of or in the nature of certiorari quashing the second respondent's decision as to the setting of the Terms of Reference and/or his rejection of the s 7(5) request and the alternative inquiry request;
- (c) The costs of and incidental to this application for judicial review.

**THIS STATEMENT OF CLAIM** is filed by **RICHARD McLEOD** of the firm McLeod & Associates, solicitor for the applicants. The address for service of the applicants is at the offices of McLeod & Associates, Level 11, Southern Cross Building, 59 High Street, Auckland.

Documents for service on the abovenamed applicants may be left at that address for service or may be:

- (a) Posted to the solicitor at Level 11, Southern Cross Building, 59 High Street, Auckland, 1010; or
- (b) Transmitted to the solicitor by facsimile at (09) 379 6588; or
- (c) Transmitted to the solicitor by email at [richard@mcleodlaw.co.nz](mailto:richard@mcleodlaw.co.nz)